IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MARLYS G. EDLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-422-SLR
	)	
KENNETH S. APFEL, Commissioner of Social Security,	)	
	)	
Defendant.	)	

William Schab, Esquire of Schab & Barnett, P.A., Georgetown, Delaware. Counsel for Plaintiff. Of Counsel: Kirk B. Roose, Esquire of Roose & Birmingham, Oberlin, Ohio.

Carl Schnee, United States Attorney, Judith M. Kinney, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant. Of Counsel: John M. Sacchetti, Regional Chief Counsel, Amanda M. Kent, Assistant Regional Counsel, Social Security Administration, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: April 10, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Marlys G. Edley filed this action against defendant Kenneth S. Apfel, the Commissioner of Social Security ("Commissioner") on July 2, 1999. (D.I. 1) Plaintiff seeks judicial review pursuant to 42 U.S.C. § 405(g) of a decision by the Commissioner denying her claim for disability insurance benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-433 and §§ 1381-1383f. Currently before the court are the parties' cross-motions for summary judgment. (D.I. 15, 16) For the reasons that follow, the court shall deny the motions for summary judgment and remand the case to the Commissioner for further proceedings.

II. PROCEDURAL HISTORY

On August 3, 1994, plaintiff filed a claim for disability insurance benefits and supplemental security income benefits based on asthma and back problems, alleging an onset date of March 17, 1994. (D.I. 9 at 11, 12, 52, 59) The claim was rejected initially and upon reconsideration. (Id. at 101-06) On May 20, 1997, an administrative law judge ("ALJ") held a hearing at which plaintiff testified and was represented by counsel. (Id. at 11) Medical evidence was submitted to supplement testimony given at the hearing. (Id. at 192-205)

On March 4, 1998, the ALJ issued a decision denying plaintiff benefits. (Id. at 11-22) In considering the entire record, the ALJ found the following:

> 1. The claimant met the disability insured status requirements of the [Social Security] Act on March 17, 1994, the date the claimant states she became unable to work, and continues to meet them through September 30, 1998.
>
> 2. The claimant has not engaged in substantial activity since March 17, 1994.
>
> 3. The medical evidence establishes that the claimant has severe chronic obstructive pulmonary disease, but that she does not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Regulation No. 4.
>
> 4. The Administrative Law Judge finds that the claimant's subjective complaints are credible to the extent that she is precluded from performing work requiring higher residual functional capacity than for a limited range of sedentary work with limitations as described by the undersigned in Finding No. 5.
>
> 5. The claimant has the residual functional capacity to perform the physical exertion and non-exertional requirements of work except for lifting and/or carrying of objects weighing more than 10 pounds, prolong[ed] walking and/or standing, and working in an environment with concentrated exposure to films, odors, dust, gases, poor ventilation, humidity, wetness, and extreme cold and heat (20 C.F.R. §§ 404.1545 and 416.945).

6. The claimant is unable to perform her past relevant work as sewing operator and dairy bar owner.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the above-mentioned limitations as described in Finding No. 5.

8. The claimant is 48 years old, which is defined as a younger person (20 C.F.R. §§ 404.1563 and 416.963)

9. The claimant has a high school education (G.E.D.) (20 C.F.R. §§ 404.1564 and 416.964)

10. The claimant does not have any acquired work skills, which are transferable to the skilled or semiskilled work functions of other work (20 C.F.R. §§ 404.1568 and 416.968).

11. Based on an exertional capacity for the full range of sedentary work and the claimant's age, education, and work experience, section 404.1569 of Regulation No. 4, and section 416.969 of Regulation No. 16 and Rule 201.21 or 201.22, Table No. 1, of Appendix 2, Subpart P, Regulation No. 4 would direct a conclusion of "not disabled."

12. The claimant's capacity for the full range of sedentary work has not been significantly compromised by her additional non-exertional limitations. Accordingly, using the above-cited rules as a framework for decisionmaking, the claimant is not disabled.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. §§ 404.1520 (f) and 416.920 (f)).

(Id. at 20-22)

On May 13, 1999, the Appeals Council denied plaintiff's request for review, stating that the ALJ's decision "stands as the final decision of the Commissioner of Social Security." (Id. at 3) Plaintiff now seeks review of this final decision before this court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. FACTUAL BACKGROUND

Plaintiff was born on October 2, 1949, and lives with her husband in Bridgeville, Delaware. (Id. at 34) Plaintiff received a graduate equivalency diploma and worked as a sewing operator and a dairy bar owner. (Id. at 35, 38) Since March 1994, plaintiff has not been gainfully employed, although she did work one day at a Texaco mini mart in 1995. (Id. at 39) Plaintiff claims that she did not return to Texaco because she suffered back pain after lifting milk crates on the job. (Id.)

Plaintiff testified that she suffers from asthma and requires the use of a breathing machine three or four times per day, each treatment lasting approximately fifteen minutes. (Id. at 39-40, 43) Plaintiff complains that she has shortness of breath even without exertion, sometimes triggered by the smell of smoke or other odors. (Id. at 43, 45) She takes Prednisone and various inhalers for her asthma and claims that it sometimes takes a couple of weeks for her to get over a cold. (Id. at 45-

46) Plaintiff testified that she drives, shops, and does some of the housework.[1] (Id. at 34-35)

Plaintiff was treated by Dr. Robert Walton for her asthma for nine months in 1994. (Id. at 107-10) On March 3, 1994, Dr. Walton stated that plaintiff "was not acutely ill and appeared to be comfortable and in no distress." (Id. at 110) On March 15, 1994, plaintiff reported an increasing shortness of breath with watery inflamation of the nose. (Id.) Dr. Walton concluded that plaintiff had mild exacerbation of her asthma and treated her with prescription medications. On March 28, 1994, plaintiff complained of lower back pain and told Dr. Walton that her chiropractor had written a letter to plaintiff's employer asking that she be given a job that could be performed in a continuous sitting position. Dr. Walton examined plaintiff and noted that she "did not appear acutely ill" and "did not display any pain with straight leg raising to 90° bilaterally." (Id.)

Plaintiff was hospitalized for three days in April 1994 for severe left flank pain. During her stay, she underwent a systole urethroscopy and had a kidney stone removed. She also received a stent. (Id. at 112)

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[1]In August 1994, plaintiff completed a Disability Supplemental Review Outline, in which she stated that she was able to dress and bathe herself, take care of her hair, do the laundry and the dishes, go grocery and clothes shopping, cook once a day, and handle her own bills. (D.I. 9 at 89-90)

In May 1994, plaintiff returned to the hospital complaining of vomiting and wheezing, and was treated and released. (Id. at 135) Later that month, plaintiff was examined by Dr. Walton, who detected no audible wheezing and determined that plaintiff's lungs were clear. (Id. at 109)

In July 1994, plaintiff went to the emergency room complaining of breast soreness and nipple discharge. (Id. at 139) A mammogram was normal and a gram stain was negative. (Id. at 142) A month later, Dr. Carl Edwards examined plaintiff and determined the problem was resolved. (Id.)

Plaintiff was hospitalized for eleven days in August 1994 for status asthmaticus and respiratory failure. (Id. at 146) She was admitted to the intensive care unit where she was intubated and placed on a ventilator. (Id. at 150-51) After a few days, a report from the radiology department indicated that plaintiff's lungs were well expanded and appeared clear. (Id. at 152) Plaintiff was discharged after being advised to avoid excessive consumption of her metered dose inhalers. (Id. at 146)

In August and September, Dr. Walton noted that plaintiff had no exacerbation of asthma and that her lungs were clear. (Id. at 109) On October 4, 1994, Dr. Walton opined that plaintiff "continued to do well." (Id. at 108) On November 21, 1994, plaintiff reported having a cold with increasing inflamation of her nose, however, she voluntarily reduced her asthma medication. Dr. Walton advised her against any further reduction in

medication. (Id.) At this time, plaintiff was taking Prednisone, Serovent, Proventil, Axmacort and Atrovent. (Id. at 14)

Plaintiff's pulmonary function testing results in October 1994 were described as "good." (Id. at 155) Her results in November were consistent with "moderate chronic obstructive pulmonary disease with fair to good response to bronchial dilation." (Id. at 156)

In January 1995, plaintiff had an initial visit with Dr. Joseph Karnish, who noted decreased breath sounds with occasional late expiratory wheezes. (Id. at 175) Plaintiff was advised about the problems caused when she abruptly stopped taking Prednisone. (Id.) Plaintiff returned to see Dr. Karnish in February 1995, when she was diagnosed with sinusitis and gastritis. (Id. at 174)

Plaintiff was hospitalized for seven days in May 1995 due to status asthmaticus secondary to pneumonia. (Id. at 184) She arrived at the hospital complaining of increasing shortness of breath, and the initial diagnosis, in addition to asthma, indicated acute bronchitis and hypertension. (Id.) Plaintiff claimed she had been living in her in-laws' basement, which was musty and cold. (Id.) She was discharged on May 23, 1995 by Dr. Cynthia Zarraga, who advised her to avoid vacuuming, smoking, grass, pollen, and other trigger factors. (Id. at 187)

On February 9, 1997, plaintiff went to the emergency room complaining of wheezing and chest pain. She was treated and released the same day. (Id. at 181) Dr. Zarraga treated plaintiff again in April 1997, and concluded that most of plaintiff's problems were related to her asthma. (Id. at 189) Dr. Zarraga noted that plaintiff's triggers were upper respiratory infections, strong odors, exercise, extremes of temperature with change in humidity and cold, and that plaintiff experienced 4-5 exacerbations per year. (Id.) In regard to whether plaintiff was able to work, Dr. Zarraga concluded:

> This is her main problem, and that is why she is unable to work as her respiratory condition is very episodic with recurrent exacerbations of her asthma. Her working will definitely exacerbate this asthma as exercise is one of her trigger factors. Moreover, conditions where she could find employment would have to be conducive to her working as exposure to increased humidity and sudden changes in temperature, tobacco smoke, or strong odors would trigger her. [Plaintiff's] asthma is very labile and can get really bad fast.
>
> . . .
>
> I certainly agree that [plaintiff's] episodic exacerbation of her asthmatic condition makes her unable to hold gainful employment at this point and could possible expose her to conditions which can cause worsening of her asthmatic condition. We know that her trigger factors would include change in climate or humidity. Moreover, increased activity and exercise would also be a trigger factor for her condition.

(Id. at 190-91) Dr. Zarraga recommended new pulmonary function testing for plaintiff.

Plaintiff underwent pulmonary function testing in September 1997 and was diagnosed with moderately severe chronic obstructive pulmonary disease ("COPD") with demonstrable bronchospasm. Plaintiff was unable to complete the entire test. (Id. at 193)

In December 1994, a state agency physician, Dr. Steve Owens, reviewed plaintiff's file and concluded that plaintiff could lift fifty pounds occasionally and twenty-five pounds frequently, could stand for six hours and sit for six hours in an eight-hour workday, and should avoid concentrated exposure to fumes, odors, dusts, gases, and poor ventilation. (Id. at 165-72) In April 1995, Dr. Philip Moore reviewed the record and agreed with Dr. Owen's assessment. (Id. at 171)

IV. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g); 5 U.S.C. § 706(2)(E) (1999); see Menswear Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

> "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict

> when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 56:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986) (internal citations omitted). Thus, in the context of judicial review under § 405(g),

> "[a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence — particularly certain types of evidence (e.g., that offered by treating physicians) — or if

> it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

V. DISCUSSION

A. Standards for Determining Disability

Congress enacted the Supplemental Security Income Program in 1972 "to assist 'individuals who have attained age 65 or are blind or disabled' by setting a guaranteed minimum income level for such persons." Sullivan v. Zebley, 493 U.S. 521, 524 (1990) (quoting 42 U.S.C. § 1381). Disability is defined in § 1382c(a)(3) as follows:

> (A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.
>
> (B) For purposes of subparagraph (A), an individual shall be determined to be under a

> disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.
>
> . . .
>
> (D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C. § 1382c(a)(3). Governing regulations set forth a five-step test for determining whether a claimant falls within this definition:

> The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. See 20 C.F.R. §§ 416.920(a)-(c) (1989). In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. See 20 C.F.R. pt. 404, subst. P, App. 1 (pt. A) (1989). If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R.] § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. [20 C.F.R.] §§ 416.920(e) and (f).

Sullivan, 493 U.S. at 525.

The determination whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Department of Health and Human Services Regulations ("the grids"). See Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). The grids require the ALJ to take into consideration the claimant's age, educational level, previous work experience, and residual functional capacity. See 20 C.F.R. §404, subst. P, app. 2 (1999). If the claimant suffers from significant non-exertional limitations, such as pain or psychological difficulties,[2] the ALJ must determine, based on the evidence in the record, whether these non-exertional limitations further limit the claimant's ability to work. See 20 C.F.R. §

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[2]The regulations list the following examples of non-exertional limitations:

> (i) You have difficulty functioning because you are nervous, anxious, or depressed;
>
> (ii) You have difficulty maintaining attention or concentrating;
>
> (iii) You have difficulty understanding or remembering detailed instructions;
>
> (iv) You have difficulty in seeing or hearing;
>
> (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or
>
> (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

20 C.F.R. § 404.1569a(c).

404.1569a(c)-(d). If they do not, the grids may still be used. If, however, the claimant's non-exertional limitations are substantial, the ALJ must use the grids as a "framework" only. See 20 C.F.R. § 404, subst. P, app. 2, § 200(d)-(e). In such a case, or if a claimant's condition does not match the definition provided in the grids, determination of whether the claimant can work is ordinarily made with the assistance of a vocational specialist. See Santise v. Schweiker, 676 F.2d 925, 935 (3d Cir. 1982).

B. Application of the Five-Step Test

In the present case, the first four steps of the five-part test to determine whether a person is disabled are not at issue: (1) plaintiff is not working; (2) plaintiff's impairment has lasted more than twelve months; (3) plaintiff does not have an impairment equal to or meeting one listed in the regulations; and (4) plaintiff is unable to perform her past relevant work. The issue in this case concerns the fifth step: whether or not plaintiff can perform other work existing in the national economy. See Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993).

In the context of this five-step test, plaintiff had the burden of demonstrating that she was unable to engage in her past relevant work. See 42 U.S.C. §§ 416(I), 423(d)(1)(A); Mason, 994 F.2d at 1064. Since the ALJ determined that plaintiff satisfied

that requirement, the burden shifted to the Commissioner to show that plaintiff can perform other work existing in the national economy. See Mason, 994 F.2d at 1064. In making this determination, the ALJ referred to the grids, specifically Vocational Rules 201.21 and 201.22, which state that a skilled or semi-skilled claimant aged 45-49, with at least a high school education and the residual functional capacity for sedentary work, is not disabled. However, the ALJ acknowledged that plaintiff was precluded from working in environments with concentrated exposure to films, odors, dust, gases, poor ventilation, humidity, wetness and extreme cold and heat. Because the court finds that the ALJ did not consult additional vocational evidence and did not give adequate consideration to the opinion of plaintiff's treating physician, the court remands the case to the Commissioner for further proceedings.

C. The ALJ Did Not Consider Additional Vocational Evidence or Provide Administrative Notice With an Opportunity to Respond

When a claimant has a combination of exertional and non-exertional impairments, the Commissioner cannot meet his burden of proving that there are jobs in the national economy that plaintiff can perform by relying exclusively on the grids. Absent a Social Security Ruling ("SSR") identifying jobs for such claimants or stating that their non-exertional impairments are not significant enough to diminish the occupational base, the

Commissioner must either: (1) take additional vocational evidence supporting the existence of jobs that the claimant is able to perform, or (2) provide notice to the claimant of his intent to take official notice of that fact, along with the opportunity to counter his conclusion. See Sykes v. Apfel, 228 F.3d 259, 270 (3d Cir. 2000). Additional vocational evidence may be in the form of the testimony of a vocational expert or other similar evidence, such as a learned treatise. See Sykes, 228 F.3d at 273.[3]

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[3]In the wake of Sykes v. Apfel, the Social Security Administration promulgated an Acquiescence Ruling that applies to all claims for benefits made within the jurisdiction of the Third Circuit:

> In making a disability determination or decision at step 5 of the sequential evaluation process (or the last step in the sequential evaluation process in continuing disability review claims), we cannot use the grid rules exclusively as a framework for decisionmaking when an individual has an exertional limitation(s). Before denying disability benefits at step five when a claimant has a non-exertional limitation(s), we must:
>
> (1) take or produce vocational evidence such as from a vocational expert, the [Dictionary of Occupational Titles] or other similar evidence (such as a learned treatise); or
>
> (2) provide notice that we intend to take or are taking administrative notice of the fact that the particular non-exertional limitation(s) does not significantly erode the occupational job base, and allow the claimant the opportunity to respond before we deny the claim.
>
> This Ruling does not apply to claims where we rely on an SSR that includes a statement explaining how the particular non-exertional limitation(s) under consideration in the claim being adjudicated affects a claimant's occupational job base. When we rely on such an SSR to support our finding that jobs exist in the national economy that the claimant can do, we will

In the case at bar, plaintiff suffers from an environmental restriction that functions as a non-exertional limitation on her ability to perform sedentary work. In his decision, the ALJ failed to identify any SSRs identifying jobs for claimants with such limitations or stating that such non-exertional limitations are not significant enough to diminish the occupational base for sedentary work.[4] Consequently, the ALJ should have either

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> include a citation to the SSR in our determination or decision.

Sykes v. Apfel; Using the Grid Rules as a Framework for Decisionmaking When an Individual's Occupational Base is Eroded by a Non-exertional Limitation – Titles II and XVI of the Social Security Act, 2001 WL 65745, at *4 (S.S.A. Jan. 25, 2001).

[4]In defendant's brief, the Commissioner cited two SSRs supporting his position. The court concludes, however, that these SSRs suggest that a claimant with plaintiff's environmental restrictions (avoiding concentrated exposure to films, odors, dust, gases, poor ventilation, humidity, wetness and extreme cold and heat) should benefit from additional vocational evidence:

> In general, few occupations in the unskilled sedentary occupational base require work in environments with extreme cold, extreme heat, wetness, humidity, vibration, or unusual hazards. . . .
>
> Since all work environments entail some level of noise, restrictions on the ability to work in a noisy workplace must be evaluated on an individual basis. The unskilled sedentary occupational base may or may not be significantly eroded depending on the facts in the case record. In such cases, it may be especially useful to consult a vocational resource.
>
> **Restrictions to avoid exposure to odors or dust must also be evaluated on an individual basis.** The RFC assessment must specify which environments are restricted and state the extent of the restriction; e.g., whether only excessive or even small amounts of dust must be avoided.

Policy Interpretation Ruling Titles II and XVI: Determining Capability To Do Other Work – Implications of a Residual Functional Capacity for Less Than a full Range of Sedentary Work, SSR 96-9p, 1996 WL 374185, at *9 (S.S.A. Jul. 2, 1996) (emphasis

considered additional vocational evidence or taken official notice of his decision that plaintiff's environmental restrictions do not significantly reduce the work base and have given plaintiff an opportunity to respond to his decision.[5] The ALJ did neither of these. Therefore, the court remands this case to the Commissioner for further proceedings in accordance with the court's opinion.

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added).

> Where a person has a medical restriction to avoid excessive amounts of noise, dust, etc., the impact on the broad world of work would be minimal because most job environments do not involve great noise, amounts of dust, etc.
>
> Where an individual can tolerate very little noise, dust, etc., the impact on the ability to work would be considerable because very few job environments are entirely free of irritants, pollutants, and other potentially damaging conditions.
>
> **Where the environmental restriction falls between very little and excessive, resolution of the issue will generally require consultation of occupational reference materials or the services of a [vocational expert].**

Titles II and XVI: Capability To Do Other Work — Themedical-Vocational Rules as a Framework for Evaluation Solely Non-exertional Impairments, SSR 85-15, 1985 WL 56857, at *8 (S.S.A. 1985) (emphasis added). Based on the record, it appears unlikely that plaintiff is limited to avoiding only "excessive" environmental restrictions.

[5]Although the court does not decide whether the Commissioner could rely on official notice to establish that plaintiff's environmental limitations do not significantly diminish the occupational base for sedentary work, the ALJ would have had to provide plaintiff with notice of his intent to notice that fact and, if plaintiff raised a substantial objection, an opportunity to respond. See, e.g., Sykes, 228 F.3d at 273.

D. The ALJ Did Not Give Adequate Consideration to the Opinion of Plaintiff's Treating Physician

Treating physicians' reports should be accorded great weight, especially "when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) (quoting Rocco v. Heckler, 826 F.2d 1348, 1350 (3d Cir. 1987)); 20 C.F.R. § 404.1527(d)(2) (providing for controlling weight where treating physician opinion is well-supported by medical evidence and not inconsistent with other substantial evidence in the record). An ALJ may reject a treating physician's opinion outright only on the basis of contradictory medical evidence, but may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided. See Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). Where the opinion of a treating physician conflicts with that of a non-treating, non-examining physician, the ALJ may choose whom to credit but "cannot reject evidence for no reason or for the wrong reason." Morales, 225 F.3d at 317 (quoting Mason, 994 F.2d at 1066). In choosing to reject the treating physician's assessment, an ALJ may not make "speculative inferences from medical reports" and may reject "a treating physician's opinion outright only on the basis of contradictory medical evidence" and not due to his or

her own credibility judgments, speculation or lay opinion. Id. (quoting Plummer, 186 F.3d at 429).

In the present case, the ALJ rejected Dr. Zarraga's conclusion that plaintiff could not work because it "is not supported by the claimant's pulmonary function tests, physical examination, and other medical reports." (D.I. 9 at 19) The ALJ further stated:

> Pulmonary function tests show that the claimant had fair to good response with bronchodilators. Dr. Zarraga reported that the claimant's asthmatic condition had improved since [she] started seeing her in 1995. Although Dr. Zarraga stated that the claimant was seen by her 4 to 5 times a year for evaluation due to exacerbation of her asthma, she had good recovery with prescription medications. The claimant's last asthmatic related hospitalization was in May 1995. Dr. Zarraga's statement that the claimant could not work appears to refer to the claimant performing her past relevant work. She stated that the claimant's working would definitely exacerbate her asthma as exercise was one of her trigger factors. She stated that conditions where the claimant could find employment would have to be conducive to her working as exposure to increased humidity and sudden changes in temperature, tobacco smoke or strong odors would trigger her. Dr. Zarraga also stated that the claimant's condition was exacerbated by her financial constraints and inability to obtain prescription medication. The undersigned finds that the claimant's symptoms are adequately addressed by her working at a job only requiring sedentary type work with preclusion from environmental factors as described by the undersigned above.

Id.

Based on the above analysis, the ALJ concluded that plaintiff should avoid only **concentrated** exposure to films, odors, dust, gases, poor ventilation, humidity, wetness, and

extreme cold and heat. The court finds that the ALJ erred in determining the severity of plaintiff's environmental restrictions. The ALJ based his determination on his own interpretation of Dr. Zarraga's opinion and the effects of plaintiff's medications. Presumably, the ALJ also considered the (non-treating) state physician's report filed in 1994, before Dr. Zarraga began treating plaintiff. This evidence is insufficient to outweigh Dr. Zarraga's opinion. The ALJ must reconsider all the evidence, giving greater weight to Dr. Zarraga's report, to properly characterize the severity of plaintiff's environmental limitations.[6]

VI. CONCLUSION

For the reasons stated above, the court shall remand the case to the Commissioner for further proceedings. An appropriate order shall issue.

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[6]Plaintiff also argues that the case should be remanded because the ALJ failed to recontact Dr. Zarraga for further clarification of her report. SSR 96-5p states:

> Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

Policy Interpretation Ruling Titles II and XVI: Medical Source Opinions on Issues Reserved to the Commissioner, SSR 96-5p, 1996 WL 374183, at *6 (S.S.A. July 2, 1996). In the case at bar, the medical evidence supports Dr. Zarraga's opinion regarding the severity of plaintiff's limitation, and she states the basis for her opinion in her report. Therefore, it is unnecessary for the ALJ to recontact Dr. Zarraga.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MARLYS G. EDLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-422-SLR
	)	
KENNETH S. APFEL, Commissioner of Social Security,	)	
	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 10th day of April, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff’s motion for summary judgment (D.I. 15) is denied.

2. Defendant’s motion for summary judgment (D.I. 16) is denied.

3. The case is remanded to the Commissioner for further proceedings.

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United States District Judge